IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. OMAR GUADALUPE PEREZ, Petitioner.	2 CA-CR 2009-0146-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20081479

Honorable Teresa Godoy, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

Isabel G. Garcia, Pima County Legal Defender
By Stephan J. McCaffery
Tucson
Attorneys for Petitioner

H O W A R D, Chief Judge.

¶1 Pursuant to a plea agreement, petitioner Omar Guadalupe Perez was convicted of possession of a narcotic drug for sale. The trial court sentenced him to a mitigated prison term of four years. Perez filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., followed by a petition in which he asserted that, because he is a Mexican national who speaks no English, cultural and language barriers had prevented him from understanding the plea agreement, particularly with respect to the sentencing ramifications. He asserted his plea was not knowing, voluntary, and intelligent and requested that the court vacate the conviction or grant an evidentiary hearing.[1] The court summarily denied relief. In his petition for review, Perez challenges that ruling, claiming the court erred when it dismissed the petition without first conducting an evidentiary hearing. We will not disturb the trial court's ruling absent an abuse of discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶2 Perez contended in his Rule 32 petition that he had misunderstood the plea agreement and believed the range of years set forth in the plea agreement "governed how long he could be deported." He added that "[h]is understanding of the change of plea hearing was that it was primarily a sort of deportation hearing." He insisted he had not understood he could be sentenced to prison, believing instead that he could avoid a prison term by

[1]Although a caption in the petition characterized the claim as one of ineffective assistance of counsel, in his petition for review, Perez suggests this was an incorrect heading and that his claim was always intended to be a challenge to the validity of the plea based on his having failed to understand his plea agreement.

pleading guilty and that at most he could be ordered to serve a jail term. Perez supported this claim with his own minimal affidavit, as well as an opinion letter by Maria de Lourdes Avila, who stated she has a Master of Arts degree in Language, Reading and Culture, a Bachelor of Arts degree in Spanish Literature, is a Spanish language instructor, is enrolled in the interpretation and translation course at Pima Community College, and worked at the office of the Pima County Legal Defender. She described nuances related to Spanish words Perez had used to explain what he had understood the plea meant rather than what it provided and what was explained to him and what it provided.

¶3 In light of the record of the change-of-plea proceeding, the trial court found Perez had not raised a colorable claim for relief. The court noted that Perez had had an interpreter at the change-of-plea hearing and that the judge who accepted the plea had reviewed it with Perez, ascertaining that counsel, who spoke Spanish, had reviewed the agreement with him with the benefit of an interpreter. The court further noted that the judge who had presided over Perez's change-of-plea hearing had reviewed the relevant provisions of the agreement with him, including the fact that, although probation was available, so, too, was a prison term, and had informed Perez of the correct sentencing range if he were to be found guilty. Although no purpose would be served by rehashing the court's minute entry in its entirety, the court concluded Perez had failed to raise a colorable claim entitling him to an evidentiary hearing "to prove that his linguistic and cultural background prevented him from properly understanding the sentencing consequences of the plea agreement." Perez

filed a motion for rehearing, which the trial court denied. On review, Perez contends as he did in his motion for rehearing, that the court applied the wrong standard in determining whether he had raised a colorable claim entitling him to an evidentiary hearing.

¶4 A defendant is entitled to an evidentiary hearing on a Rule 32 petition when he or she presents a colorable claim for relief. *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). A colorable claim is "one which has the appearance of validity." *State v. Gunter*, 132 Ariz. 64, 71, 643 P.2d 1034, 1041 (App. 1982). Generally, for purposes of determining whether a claim is colorable, the factual allegations must be taken as true. *See id*. Perez contends the trial court erred by assessing his petition under the reasonable evidence standard set forth in *State v. Brewer*, 170 Ariz. 486, 826 P.2d 783 (1992). He is correct that the appellate court's review in that case of the trial court's finding that the defendant had been competent to enter a plea is not the same as a trial court's determination of whether a defendant has raised a colorable claim warranting an evidentiary hearing under Rule 32. Nevertheless, the trial court was correct that Perez did not raise a colorable claim given the nature of his arguments in the petition and, most importantly, the record from the change-of-plea hearings. That is because, in order to be entitled to post-conviction relief, a defendant must be able to prove the allegations in the petition by a preponderance of the evidence. Ariz. R. Crim. P. 32.8(c); *see also State v. Verdugo*, 183 Ariz. 135, 139, 901 P.2d 1165, 1169 (1995) (at evidentiary hearing petitioner must prove allegations in petition by preponderance of evidence). "To mandate an evidentiary hearing, [a] defendant's challenge

must consist of more than conclusory assertions and be supported by more than regret." *State v. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d 1193, 1201 (App. 2000). The trial court did not abuse its discretion in determining Perez would be unable to do so.

¶5 Regardless of what Perez now claims, at the change-of-plea hearing the terms of the plea agreement were explained to him, and he assured the court he understood them.[2] He had the assistance of an interpreter, whose proficiency he has never challenged. Indeed, when the change-of-plea hearing began, defense counsel noted Perez was "using the services of the Spanish interpreter, whose qualifications we verify." And Perez's own expert stated in her letter the interpreter was "qualified." Nor has Perez asserted that the interpreter incorrectly translated the words spoken by the trial judge at the change-of-plea hearing. The state asserted in the trial court, and Perez has never disputed, that Perez's counsel was Spanish-speaking as well. Furthermore, at sentencing, Perez asked for leniency and said, "I have never been in prison." And he did not object at sentencing to the imposition of the prison term.

¶6 The court was correct that, under the circumstances, the judge who accepted the plea had the right to rely on Perez's assurances that Perez understood the terms of the plea agreement, which the court explained as the interpreter translated. By merely

---

[2]The state pointed out in its response to the petition for post-conviction relief that Perez had been offered two plea agreements, one that did not have probation as an available option and one that did; he chose the latter, further supporting the conclusion that he knew probation was only an option and that he could be sentenced to prison. Perez has not disputed the state's assertion.

contradicting what the record clearly shows Perez has not raised a colorable claim for relief. *See State v. Jenkins*, 193 Ariz. 115, 120, 970 P.2d 947, 952 (App. 1998) (no colorable claim for relief by asserting in post-conviction proceeding he was not told sentence for second-degree murder would be served without possibility of early release when record showed defendant had stated he understood early release not possible).

¶7 Perez's expert's statements about misunderstandings relating to a few words that were presumably used are speculative and do not render unclear the court's direct statement to Perez that he could be sentenced to prison for as little as three years or as much as 12.5 years.[3] At no time did the trial court say anything suggesting the sentencing range in the plea agreement related to the number of years Perez could be barred from returning to the United States if he were deported. The final paragraph of the plea agreement simply provided that Perez understood his guilty plea could result in his deportation. Finally, Perez

[3]It is troubling that, even in English, the trial court's explanation of the plea agreement was not a model of clarity. After ascertaining from Perez that he intended to enter a guilty plea pursuant to the plea agreement, the court stated, "If you're found guilty of this charge, you face the following potential sentence . . . ." The court then reviewed the sentencing range and explained that he "could be placed on supervised probation." It was not entirely clear at that point whether the court was referring to a finding of guilty after trial or pursuant to the plea agreement. Later, after having explained to Perez the rights he was giving up, the court stated: "Your plea agreement provides that in exchange for your plea of guilty . . . the other charge will be dismissed. Probation is available to you. . . . And the sentencing is otherwise up to the judge in your case." But Perez does not contend that the way the trial court explained the plea agreement is what confused him. Rather, his request for relief is based on his contention that his alleged misunderstanding of the terms of the agreement was rooted in his cultural background and a language barrier. That claim is not colorable, as we have found.

said nothing at sentencing about having misunderstood his plea agreement, once the court rejected probation as an option.

¶8 We grant Perez's petition for review, but because he has not established the trial court abused its discretion in dismissing the petition for post-conviction relief without an evidentiary hearing, we deny relief.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

JOHN PELANDER, Judge